

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of BILLY J. McCAMEY and TENNESSEE VALLEY AUTHORITY,
PHIPPS BEND NUCLEAR PLANT, Surgoinsville, TN

*Docket No. 00-2725; Oral Argument Held March 14, 2002;
Issued June 11, 2002*

Appearances: *J. Ronnie Greer, Esq.*, for appellant; *Paul J. Klingenberg, Esq.*,
for the Director, Office of Workers' Compensation Programs.

DECISION and ORDER

Before ALEC KOROMILAS, DAVID S. GERSON,
WILLIE T.C. THOMAS

The issues are: (1) whether appellant forfeited his right to compensation in the amount of \$224,240.65 for knowingly failing to report earnings as a county commissioner during the periods January 1, 1982 to November 7, 1986 and November 14, 1986 to December 31, 1992; (2) whether appellant received an overpayment in the amount of \$1,461.74 that arose from payment of compensation for total disability from January 1, 1993 to December 15, 1994, a period during which he worked as a county commissioner and if so, whether he was at fault in the creation of this overpayment of compensation; (3) whether the Office properly refused to waive recovery of an overpayment of compensation in the amount of \$5,895.67 that arose from the Office's payment of augmented compensation from September 24, 1995 to January 4, 1997, a period during which appellant had no dependents; and (4) whether the Office of Workers' Compensation Programs properly withheld \$225.00 from appellant's continuing compensation payments to recover the overpaid amounts.

On June 18, 1981 appellant, then a 31-year-old ironworker, sustained an injury to his back when he fell through a scaffold. Following 45 days of continuation of pay, the Office began paying him compensation for temporary total disability on August 5, 1981.

On March 19, 1984 appellant, who had received compensation through December 31, 1981, filed an Office CA-8 form, titled "Claim for continuing compensation on account of disability," by which he claimed compensation from January 1, 1982 through March 19, 1984. Item 9 on this form instructed appellant to complete this item if he worked during the period compensation was claimed; under dates and hours worked, appellant wrote "No."¹ On

¹ This form apparently was submitted in response to a March 19, 1984 telephone call to the Office from the employing establishment, which had received a call from appellant's attorney who was irate over not having been advised of the need to submit CA-8 forms. The Office advised the employing establishment that this was not a critical issue at that time since causal relationship was being determined and no compensation was presently payable.

March 28, 1984 appellant filed another Office CA-8 form, claiming compensation from January 1, 1982 through March 28, 1984; this form, on which a line was drawn through the box for dates and hours worked, was also signed by Robert P. Cave, who was authorized as appellant's attorney at that time. On April 15, 1994 appellant filed another Office Form CA-8, claiming compensation from March 29 to April 15, 1984; the dates and hours worked box was left blank.

By decision dated July 23, 1984, the Office found that the weight of the medical evidence established that the effects of appellant's June 18, 1981 employment injury ceased by December 31, 1981.

By letter dated August 16, 1984, appellant requested a hearing and authorized J. Ronnie Greer, Esq. to represent him. By decision dated April 11, 1985, an Office hearing representative ordered compensation to be paid until January 25, 1982 and found a conflict of medical opinion on continuing injury-related disability.

After further developing the medical evidence, the Office, by letter dated August 1, 1985, advised appellant that it had found that his disability after January 25, 1982 was causally related to his June 18, 1981 employment injury, which permanently aggravated the spondylolisthesis of his lumbosacral spine. The Office further advised him: "In order to determine your entitlement to compensation after June 18, 1981, I need to know whether you had any earnings after January 25, 1982. Please complete and return the attached Form CA-1032, identifying all earnings/income after January 25, 1982."

Appellant submitted the Office Form CA-1032, that he signed on August 8, 1985. This form instructed appellant to report his employment history:

"1. Employment other than self-employment. Under this heading, you must report all employment, other than self-employment, for which you received salary, wages, sales commissions, piecework, or other payment. If you performed work in furtherance of a relative's or spouse's business, you must show as 'rate of pay' what it would have cost the employer or organization to hire someone to perform the work you performed. The value of housing, meals, food allowance, clothing, equipment, reimbursed expenses in a business, corporation, partnership or sole proprietorship, or other things of value must be included in the rate of pay."

Immediately under the above paragraph, the form asked: "Were you employed by an employer during the time period covered by this form?" Appellant answered "No." He answered "Yes" to the form's question "Were you unemployed for all periods during the previous fifteen months not covered under 1 or 2 above?"

On February 5 and November 7, 1986; and February 14, 1988; and January 27, 1989; and March 15; and April 18, 1990; and April 26; and December 1, 1991; and December 31, 1992, appellant signed Office Forms CA-1032, on which he answered "No" to the question whether he

was employed by an employer during the time period covered by the form, which was 15 months for each form.²

In interviews with personnel from the Greene County, Tennessee Executive Office on June 24, 1993, an agent for the employing establishment's Office of the Inspector General ascertained that appellant was elected as a county commissioner for a four-year term effective September 1, 1982, that county commissioners were not paid a salary but were paid \$35.00 for each commission meeting and \$17.50 for each committee meeting they attended and that appellant was on seven committees. On November 24, 1993 an agent of the employing establishment's Office of the Inspector General and an Assistant United States Attorney interviewed appellant, who was accompanied by his attorney Mr. Greer. Appellant stated that he was elected as a Greene County Commissioner in 1982, 1986 and 1990 and that he was unaware that he had to report the \$17.50 to \$35.00 he received for attending meetings. Appellant stated that he signed the Office's Form CA-1032, dated August 1, 1985 but that he did not answer any of the questions on the form, as he took any questionnaire he received from the Office to his attorney for assistance in filling it out. Mr. Greer stated that the writing on the August 1985 form was his, that he filled out the form for appellant who signed it and that he advised him that he did not have to report any income he received from serving as a county commissioner. Appellant stated that he took the nine subsequent CA-1032 forms, he received to Mr. Greer for assistance in filling them out and Mr. Greer stated that he answered the questions for appellant, who then signed the forms.

On January 7, 1994 appellant signed another Office Form CA-1032, on which he answered "No" to the question whether he was employed by an employer but listed Greene County, TN under name of employer, elected commissioner as kind of work, 1982 to present as dates employed and "per meeting" as rate of pay. Appellant stated that he served as an elected member of the Greene County Commission, that he received a per diem payment for each day of regular or committee meetings and that he received a total of \$875.00 during the prior 15 months. He reported employment by Greene Count as a county commissioner on an Office Form CA-1032 signed on December 28, 1994. On forms signed on December 27, 1995 and December 19, 1996 appellant reported no employment for the past 15 months and also notified the Office that he was no longer claiming compensation on account of dependents, as his younger daughter had reached age 18 in November 1995.

By decision dated September 30, 1997, the Office found that appellant forfeited his right to compensation for the periods January 1, 1982 to November 7, 1986 and November 14, 1986 to December 31, 1992 for knowingly failing to report earnings and employment on his Office CA-1032 and CA-8 forms.

On September 30, 1997 the Office issued a preliminary determination that appellant received an overpayment of compensation in the amount of \$224,240.65 that arose from his forfeiture for knowingly failing to report earnings. On September 30, 1997 the Office issued a preliminary determination that appellant received an overpayment of compensation in the

² Beginning with the form appellant signed on December 1, 1991, the paragraph advising what employment needed to be reported was modified to state: "If you performed work for which you were not paid ..." in place of "If you performed work in furtherance of a relative's or spouse's business...."

amount of \$5,895.67 that arose because appellant's last remaining dependent turned 18 years old on September 24, 1995 and he received the augmented rate of compensation for those with dependents until January 4, 1997. The Office preliminarily found appellant without fault in the matter of this overpayment. Also on September 30, 1997 the Office issued a preliminary determination that appellant received an overpayment of compensation in the amount of that arose because he received compensation for temporary total disability from January 1, 1993 to December 15, 1994, a period during which he had actual earnings as a county commissioner. The Office preliminarily determined appellant was at fault in the creation of this overpayment.

Appellant requested a hearing and submitted an Office overpayment recovery questionnaire he completed on October 28, 1997. At a hearing held on June 16, 1998 he testified that he served on the Greene County Board of Commissioners from September 1, 1982 to August 31, 1994, that the amount he received for this service never exceeded \$1,000.00 in any year and that he had completed the ninth grade and later received a graduate equivalency degree (GED). Appellant also testified that when he received the first form from the Office he did not understand all of it, that he took it to Mr. Greer to discuss whether his service on the county board constituted employment he must report, that he answered the questions on the Office's forms based on Mr. Greer's advice, that given this advice he believed he had answered the questions truthfully and that he considered the payments from Greene County expenses rather than payment for work. Mr. Greer testified that he advised appellant that employment was considered work for pay and that he did not consider appellant's periodic attendance at meetings to be work for pay, "especially since the payment he got was more in the nature of a per diem than a salary, because he only got it if he attended." Mr. Greer also testified that he advised appellant that the form was not requesting that he disclose this information since it was not employment, that appellant relied on his advice and that in retrospect he may have given appellant bad advice.

By decision dated June 2, 2000, an Office hearing representative found that appellant was at fault in the creation of the overpayment of compensation in the amount of \$1,461.74, on the basis that he did not promptly report his earnings as a county commissioner from January 1, 1993 to December 15, 1994, that appellant was without fault in the creation of the overpayment in the amount of \$5,895.67, on the basis that he reported the change in the status of his dependents and that appellant was at fault in the creation of the overpayment in the amount of \$224,240.65 on the basis that he knowingly failed to report his earnings as a county commissioner. The Office hearing representative refused to waive recovery of the overpayment in the amount of \$5,895.67, finding that appellant's monthly income exceeded his monthly expenses by \$457.34. The Office compromised appellant's debt resulting from all three overpayments to the amount of \$53,832.86 and determined that collection should be made by deducting \$225.00 from each of appellant's continuing compensation payments.

The Board finds that appellant did not forfeit his right to compensation in the amount of \$224,240.65 for knowingly failing to report earnings as a county commissioner during the periods from January 1, 1982 to November 7, 1986 and from November 14, 1986 to December 31, 1992.

Section 8106(b) of the Federal Employees' Compensation Act³ provides in pertinent part:

“The Secretary of Labor may require a disabled employee to report his earnings from employment or self-employment, by affidavit or otherwise, in the manner and at the times the Secretary specifies.... An employee who --

(1) fails to make an affidavit or report when required; or

(2) knowingly omits or understates any part of his earnings; forfeits his right to compensation with respect to any period for which the affidavit or report was required. Compensation forfeited under this subsection, if already paid, shall be recovered by a deduction from the compensation payable to the employee or otherwise recovered under § 8129 of this title, unless recovery is waived under that section.”

On Office CA-1032 forms, signed by appellant from August 8, 1985 to December 31, 1992, the question whether he was employed by an employer during the periods covered by the form was answered “No.” At all times covered by these forms appellant served in an elected position as a county commissioner and received payments in the amount of \$17.50 to \$35.00 for each board or committee meeting he attended. As the Office’s regulations define “earnings” to include “reimbursed expenses,”⁴ the payments appellant received from Greene County for his service as a county commissioner should have been reported to the Office, even if they are considered per diem rather than wages.

Appellant, however, can only be subjected to the forfeiture provision of section 8106(b) of the Act if he “knowingly” failed to report earnings from employment or self-employment. As forfeiture is a penalty, it is not enough merely to establish that there were unreported earnings.⁵ Being a penalty provision, the forfeiture provided for by section 8106(b) of the Act must be narrowly construed.⁶ Until the Office’s regulations were revised on January 4, 1999, the term “knowingly” was not defined in the Act or its regulations. In common legal usage “knowingly” is defined as: “with knowledge; consciously; intelligently; willfully; intentionally.”⁷

The Office has the burden of proof to establish that appellant, either with knowledge, consciously, willfully or intentionally, failed to report earnings.⁸ To meet this burden of proof,

³ 5 U.S.C. § 8106(b).

⁴ 20 C.F.R. § 10.125(c).

⁵ *Charles Walker*, 44 ECAB 641 (1993).

⁶ *Anthony A. Nobile*, 44 ECAB 268 (1992); *Christine P. Burgess*, 43 ECAB 449 (1992).

⁷ Black’s Law Dictionary (5th ed. 1979). The term “knowingly” is defined in the Office’s regulations issued on January 4, 1999 as: “with knowledge, consciously, willfully, or intentionally.”

⁸ *Barbara L. Kanter*, 46 ECAB 165 (1995).

the Office is required to closely examine appellant's activities and statements in reporting earnings.⁹ The Office may meet this burden in several ways: by an employee's admission that they failed to report earnings they knew should be reported; by establishing that an employee pled guilty to violating applicable federal statutes by falsely completing the affidavits in a Form CA-1032;¹⁰ or by showing that upon further inquiry by the Office as to employment activities, the employee continued not to fully and truthfully reveal the nature of the employment activities.¹¹

At a hearing before an Office hearing representative on June 16, 1998 and in an interview with an employing establishment agent from its Office of the Inspector General on November 24, 1993, appellant maintained that he took each of the Office CA-1032 forms, to his attorney, Mr. Greer, who not only advised him that he did not have to report his earnings as a county commissioner, but who actually filled out the forms, which appellant then signed. At both the hearing and the interview, Mr. Greer corroborated appellant's account of how the forms were completed and explained that he advised appellant that he did not need to report his service as a county commissioner because it did not constitute employment, which is what the forms instructed appellant to report.

Under these circumstances, it cannot be said that appellant failed to report earnings on his CA-1032 forms, with knowledge, consciously, willfully or intentionally. Even if the attorney's advice was incorrect, appellant's reliance on the advice of his attorney that he did not need to report his earnings as a county commissioner is inconsistent with the Office's finding that appellant knowingly failed to report these earnings.

The Board also finds that appellant did not forfeit compensation for the period from January 8, 1982 to April 15, 1984 during which he did not report earnings as a county commissioner on Office CA-8 forms.

On Office CA-8 forms, dated March 19, March 28 and April 15, 1994, appellant claimed compensation for wage loss from January 1, 1982 to April 15, 1984. On these forms appellant did not list any work and he served as an elected county commissioner from September 1, 1982 through April 15, 1994.

The Board has affirmed Office findings that compensation was forfeited on the basis of failure to report earnings on Office CA-8 forms. In these cases, the Board relied upon the "broad, inclusive language" on the CA-8 forms, that instructed appellant to report whether they "worked for anyone" and whether they engaged in salaried employment, commission employment or self-employment.¹² This was not the language on the Office CA-8 forms,

⁹ See *Royal E. Smith*, 44 ECAB 417 (1993). Federal (FECA) Procedure Manual, Part 2 -- Claims, *Periodic Review of Disability Cases*, Chapter 2.812.10(c) (July 1993) states that "the circumstances of the case should be carefully evaluated with respect to the claimant's age, education level and familiarity with the reporting requirements, as well as the nature of the employment/earnings involved and any other relevant factors."

¹⁰ *Iris E. Ramsey*, 43 ECAB 1075 (1992).

¹¹ *Barbara L. Kanter*, *supra* note 8.

¹² E.g., *James M. Steck*, 49 ECAB 134 (1997); *John E. Martin, Jr.*, 49 ECAB 298 (1998); *Glenn Robertson*, 48 ECAB 344 (1997); *James H. Hopkins*, 48 ECAB 281 (1997).

completed by appellant. On the forms completed by him, item 9 stated “Complete this item if you worked during the period shown in item 6.”¹³ The subitems under item 9 were “a. Dates and hours worked,” “b. Pay rate (per hour, day or week),” “c. Total amount earned,” “d. Type work performed” and “e. Name & address of employer.” This language is not nearly as broad and inclusive as the language in which the Board affirmed forfeitures based on Office CA-8 forms.

The CA-8 forms that appellant completed are more like the CA-7 forms, that the Board found insufficient to support a forfeiture of compensation. The CA-7 forms, instructed claimants to report any “pay” received during the period for which compensation was claimed. The Board found that the CA-7 forms’, question about pay “open to various reasonable interpretations” and was “not specific enough to reasonably put appellant on notice that he had to report all earnings received in that period no matter what the source....”¹⁴

The Office CA-8 forms, that appellant completed were also not specific enough to put appellant, whose formal education ended in the ninth grade, on notice that he had to report the amounts he received for attending meetings as an elected county commissioner. Appellant’s employment status was more ambiguous than the cases in which the Board affirmed a forfeiture based on CA-8 forms: those cases involved employment as a youth minister, a musician and a sole owner and proprietor of a used car business. Appellant’s “work” situation is analogous to that of *Christine P. Burgess*,¹⁵ who received free travel, lodging and food while serving as an escort on tours. The Board found that she was required to report these “earnings,” but that she did not fail to do so knowingly, despite the fact that she completed the more explicit and inclusive Office Form CA-1032.

The Office did not meet the burden of proof to show that appellant knowingly failed to report earnings under the standards set forth above. Appellant did not admit that he failed to report earnings he knew should be reported; he did not plead guilty to violating applicable federal statutes by falsely completing the affidavits in a Form CA-1032 and he did not, upon further inquiry by the Office as to employment activities, continue not to fully and truthfully reveal the nature of the employment activities. Appellant has consistently maintained that he did not consider his service as a county commissioner to be work or employment, or the payments he received to attend meetings to be pay or earnings. The ambiguity of the Office’s CA-8 forms, coupled with the ambiguity of appellant’s “work” situation is inconsistent with a finding that he knowingly failed to report earnings on these forms.

The Board finds that appellant received an overpayment of compensation that arose from payment of compensation for total disability from January 1, 1993 to August 31, 1994, a period during which appellant worked as a county commissioner.

During the period January 1, 1993 to August 31, 1994 appellant was not entitled to compensation for total disability, as he had earnings as a county commissioner. Even though these earnings may not have represented appellant’s wage-earning capacity, the actual earnings

¹³ Item 6 is the period compensation is claimed as a result of pay loss.

¹⁴ *Glenn Robertson*, *supra* note 12; *Steven G. Leonard*, 40 ECAB 742 (1989).

¹⁵ 43 ECAB 449 (1992).

during this period are offset from appellant's compensation payments using a prescribed formula.¹⁶ The Office, however, incorrectly determined the amount of the overpayment, as it offset appellant's compensation for total disability until December 15, 1994. As the evidence shows that appellant's service as a county commissioner ended on August 31, 1994, the amount of this overpayment of compensation must be recalculated.

The Board finds that appellant was without fault in the creation of the overpayment of compensation that arose from his earnings as a county commissioner from January 1, 1993 to August 31, 1994.

Section 8129(a) of the Act provides that where an overpayment of compensation has been made "because of an error of fact or law," adjustment shall be made by decreasing later payments to which an individual is entitled. The only exception to this requirement is a situation which meets the tests set forth as follows in section 8129(b): "Adjustment or recovery by the United States may not be made when incorrect payment has been made to an individual who is without fault and when adjustment or recovery would defeat the purpose of the Act or would be against equity and good conscience."¹⁷ No waiver of an overpayment is possible if the claimant is not "without fault" in helping to create the overpayment.

Section 10.433 of Title 20 of the Code of Federal Regulations provides:

"A recipient who has done any of the following will be found to be at fault with respect to creating an overpayment:

- (1) Made an incorrect statement as to a material fact which he or she knew or should have known to be incorrect; or
- (2) Failed to provide information which he or she knew or should have known to be material; or
- (3) [A]ccepted a payment which he or she knew or should have known to be incorrect. (This provision applies only to the overpaid individual.)"¹⁸

The Office found appellant at fault for the overpayment in the amount of \$1,461.74 on the basis that he did not promptly report that he had returned to work. This would constitute fault under the second standard of 20 C.F.R. § 10.433: failure to provide information which he knew or should have known to be material. Appellant reported his earnings as a county commissioner, which ended on August 31, 1994, on Office CA-1032 forms, dated January 7 and December 28, 1994. As found above, appellant had justifiably relied on the advice of his attorney to the effect that he did not have to report such earnings. The earliest that he knew or should have known that information on his earnings as a county commissioner was material was on November 24, 1993 when he and his attorney were interviewed by an agent from the

¹⁶ See *Lawrence D. Price*, 47 ECAB 120 (1995); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.7d (September 1993).

¹⁷ 5 U.S.C. § 8129.

¹⁸ 20 C.F.R. § 10.433(a).

employing establishment's Office of the Inspector General. Six weeks later, on January 7, 1994 appellant reported earnings from Greene County. The Office continued to pay him compensation for total disability for almost one year after this report. Appellant was without fault in the creation of the overpayment of compensation in the amount of \$1,461.74 and the case is remanded to the Office for consideration of waiver of recovery of this overpayment of compensation.

The Board finds that the Office properly refused to waive recovery of an overpayment of compensation in the amount of \$5,895.67 that arose from the Office's payment of augmented compensation from September 24, 1995 to January 4, 1997, a period during which appellant had no dependents.

Appellant does not dispute and the evidence shows, that he received compensation at the augmented rate for beneficiaries with dependents from September 24, 1995, when his younger daughter reached 18 years of age,¹⁹ until January 4, 1997, resulting in an overpayment of compensation in the amount of \$5,895.67.

Section 8129 of the Act²⁰ provides that an overpayment of compensation must be recovered unless "incorrect payment has been made to an individual who is without fault and when adjustment or recovery would defeat the purpose of this subchapter of the [Act] or would be against equity and good conscience." 20 C.F.R. § 10.436 provides:

"Recovery of an overpayment will defeat the purpose of the A[ct] if such recovery would cause hardship to a currently or formerly entitled beneficiary because:

"The beneficiary from whom the Office seeks recovery needs substantially all of his or her current income (including compensation benefits) to meet current ordinary and necessary living expenses; and

"The beneficiary's assets do not exceed a specified amount as determined by the Office from data furnished by the Bureau of Labor Statistics. A higher amount is specified for a beneficiary with one or more dependents."

Appellant completed an Office overpayment recovery questionnaire on October 28, 1997, listing his only income as compensation from the Office, which was in the amount of \$1,966.00 every 28 days, equivalent to \$2,129.83 per month. As found by an Office hearing representative, his monthly expenses listed on the form were \$1,412.80, to which the hearing representative added \$175.00 for food, \$50.00 for clothing and \$50.00 for home maintenance.²¹ As appellant's credit card debts were discharged in a bankruptcy proceeding on March 18, 1998, the monthly payments on these debts were properly not added to his monthly expenses. As appellant's

¹⁹ Appellant testified at the June 16, 1998 hearing that his daughter did not attend school full time after her eighteenth birthday.

²⁰ 5 U.S.C. § 8129.

²¹ Appellant had listed any amount for food, clothing or home maintenance.

monthly income exceeded his monthly expenses by \$457.34, the Office properly refused to waive recovery of the overpayments of compensation.

The Board finds that the Office properly withheld \$225.00 from appellant's continuing compensation payments to recover the overpaid amounts.

The Office's regulation on recovery of overpayments states, in pertinent part: "[The Office] shall decrease later payments of compensation, taking into account the probable extent of future payments, the rate of compensation, the financial circumstances of the individual and any other relevant factors, so as to minimize any hardship."²² The Office hearing representative's decision found that, considering appellant's financial circumstances, monthly installments of \$225.00 would minimize any hardship on appellant, by allowing sufficient income for emergencies or unexpected expenses. The evidence indicates appellant's compensation payments will continue and that given his financial circumstances, collection at this rate will not result in undue hardship.

The June 2, 2000 decision of the Office of Workers' Compensation Programs is reversed with regard to the findings that appellant forfeited his compensation for knowingly failing to report earnings as a county commissioner during the periods January 1, 1982 to November 7, 1986 and November 14, 1986 to December 31, 1992, that appellant received an overpayment of compensation in the amount of \$224,240.65 arising from this forfeiture and that appellant was with fault in the creation of the overpayment of compensation that arose from his receipt of compensation for total disability from January 1, 1993 to August 31, 1994. The case is remanded to the Office for recalculation of the overpayment in the amount of \$1,461.74 and for consideration of waiver of that overpayment. The Office's June 2, 2000 decision is affirmed with regard to the refusal to waive the overpayment in the amount of \$5,895.67 and with regard to the rate of recovery of the overpayments.

Dated, Washington, DC
June 11, 2002

Alec J. Koromilas
Member

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member

²² 20 C.F.R. § 10.441(a).